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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of Biennial Regulatory Review 2000 Daily Newspaper/Broadcast Cross-Ownership Rule	)))))))	MM Docket No. _______

To: The Commission

COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

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October 10, 2000

TABLE OF CONTENTS

PAGE

SUMMARY

Through the Telecommunications Act of 1996, Congress obligated the FCC to conduct a thorough review of all of its ownership rules every two years. NAA respectfully submits that, at least with respect to the mass media ownership rules, the agency's internal "Staff Report" in the biennial review for the year 2000 falls far short of meeting this clear statutory obligation.

The Staff Report generally does little more than summarize past or pending FCC proceedings involving the agency's broadcast ownership restrictions, with no further analysis of whether the Commission should consider repealing or relaxing a particular regulation in light of changed marketplace conditions or the Congressional goals that led to implementation of the biennial review requirement. The Commission's statutorily-imposed obligation to examine its ownership rules every two years and to determine whether the restrictions remain "necessary in the public interest as a result of competition" cannot be satisfied by simply restating prior findings or by cross-referencing separate proceedings involving a particular rule. Moreover, the abbreviated process outlined in the Staff Report fails to satisfy the FCC's duty to allow a meaningful opportunity for public comment.

As NAA has shown exhaustively in its previous submissions, the FCC's ban on newspaper/broadcast cross-ownership does not serve any demonstrable public interest objective. The Commission's continued discrimination against newspaper owners ignores competitive realities—especially in light of the agency's 1999 decision to relax virtually every remaining broadcast ownership restriction other than the

newspaper/broadcast cross-ownership rule—and is inconsistent both with the 1996 Act and with the First Amendment. In addition, the FCC's misguided policy threatens the ability of newspapers to continue to compete effectively against other, more diversified information providers. Accordingly, the Commission should promptly take the steps necessary to eliminate its outdated prohibition on newspaper/broadcast cross-ownership.

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To: The Commission

COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

The Newspaper Association of America ("NAA")[1] hereby submits its Comments in response to the Commission's *Public Notice* (FCC 00-346) requesting comment on the "Biennial Regulatory Review 2000 Staff Report" released on September 19, 2000 in connection with the mandatory biennial review proceeding for the year 2000. NAA submits that this internal report falls far short of meeting the agency's obligation under

[1] NAA is a non-profit organization representing the newspaper industry and over 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers; these members account for approximately 90 percent of daily circulation. NAA's membership also includes many nondaily U.S. newspapers and other newspapers published elsewhere in the western hemisphere as well as in Europe and the Pacific Rim. Many of NAA's members also hold licenses for broadcast stations.

NAA serves the newspaper industry and its individual members in efforts to communicate and advocate the views and interests of newspapers to all levels of government and to advance the interests of newspapers in First Amendment issues. In this capacity, NAA has participated in numerous FCC and judicial proceedings, including proceedings related to the FCC's restrictions on newspaper/broadcast cross-ownership.

the Telecommunications Act of 1996 to conduct a complete review of its ownership restrictions—including in particular its daily newspaper/broadcast cross-ownership prohibition—every two years, as well as the agency's duty to provide a meaningful opportunity for public comment in the course of that review. Further, as NAA has demonstrated on numerous occasions in the past, the FCC's newspaper/broadcast cross-ownership restriction does not serve any tenable public interest objective and cannot be reconciled with the Commission's determinations over the past decade to eliminate or substantially relax virtually every other media ownership limitation. Accordingly, NAA submits that this outdated rule should be repealed as part of the Commission's current biennial review proceeding.

I. THE FCC'S STAFF REPORT IS INSUFFICIENT TO FULFILL THE COMMISSION'S LEGAL OBLIGATION TO FULLY REVIEW ITS MASS MEDIA OWNERSHIP RULES EVERY TWO YEARS

Through Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), Congress directed the FCC to conduct a comprehensive review of all of its mass media ownership regulations every two years beginning in 1998.[2] The purpose underlying this mandate was to compel the Commission to repeal any ownership restrictions, including any prohibitions on broadcast ownership, that are not necessary to serve a demonstrable public interest objective in the contemporary media marketplace.[3] The Commission's 1998 biennial review of its broadcast ownership rules was initiated by a Notice of Inquiry

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 110-11 (1996).

[3] *Id.*

on March 13, 1998[4] and eventually resulted in a Report released on June 20, 2000.[5] Just three months later, on September 19, 2000, the FCC released its Biennial Regulatory Review 2000 Staff Report in connection with its biennial review proceeding for the year 2000.[6] However, the Staff Report plainly does not reflect a *de novo* review of the agency's broadcast ownership restrictions and fails to provide a reasonable opportunity for public comment. NAA respectfully submits that the Staff Report is clearly insufficient to satisfy the FCC's obligations under Section 202(h) to conduct a full review of its ownership rules every two years and to repeal or modify any of those rules that do not serve a demonstrable public interest purpose.

The Staff Report consists of a series of findings from the FCC's various Offices and Bureaus, each of which purportedly conducted a review of the rules that are pertinent to its operations. In some cases, the Staff Report includes detailed recommendations on whether the FCC should modify or eliminate the rules at issue. With respect to the mass media ownership rules, however, the Staff Report generally does nothing more than summarize past or pending FCC proceedings involving a particular rule, with no further analysis of whether the Commission should consider repealing or relaxing the regulation

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[4] *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry*, 13 FCC Rcd 11276 (1998).

[5] *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Biennial Review Report,* 15 FCC Rcd 11058 (2000) ("*1998 Biennial Review Report*").

[6] Federal Communications Commission Biennial Regulatory Review 2000, Staff Report, September 19, 2000 ("Staff Report").

in the proceeding mandated for the year 2000 in light of current marketplace conditions or the particular goals underlying the biennial review process. In the case of the newspaper/broadcast cross-ownership rule, for example, the Report merely recites the FCC's conclusions in its Order in the 1998 biennial review proceeding and notes the agency's promised rulemaking to consider modifying the rule and its still-pending 1996 Notice of Inquiry on possible adjustments to the newspaper/radio waiver standard.[7] The Staff Report includes no analysis whatsoever of whether the agency should consider repealing or modifying the newspaper/broadcast cross-ownership rule as part of its biennial review for the year 2000.

In addition, the Staff Report affords only a very short period of time for public comment. Indeed, the agency allowed interested parties only three weeks to submit comments in response to the entire Staff Report, which encompasses all of the Commission's rules—not merely those that are subject to the biennial review proceeding pursuant to the 1996 Congressional mandate.[8] The Staff Report, which was released only three months after the FCC's final report in the 1998 proceeding, along with whatever comments parties are able to submit under this short deadline, apparently is expected to be the basis of the Commission's biennial review report for the year 2000 proceeding.[9] Moreover, the Staff Report states that it is anticipated that the Commission will complete

[7] Staff Report at 39-40. *See also id.* at 37-38, 40-41 (review of local radio broadcast ownership rule and national television multiple ownership rule). NAA notes that the Commission has yet to issue the promised notice of proposed rulemaking, or even to indicate when it expects to do so.

[8] *See* Staff Report at 4.

[9] *See* Staff Report at 6.

its biennial review report by December 31, 2000, a scant six months after the release of its Order in the 1998 proceeding.[10]

The Commission's statutorily-imposed obligation to examine its ownership rules every two years and to determine whether the restrictions remain "necessary in the public interest as a result of competition" cannot be satisfied by simply restating prior findings or by cross-referencing separate proceedings involving a particular rule.[11] Indeed, for the agency merely to repeat the findings from its *previous* biennial review proceeding entirely defeats Congress' purpose in mandating a new review every two years.

Moreover, the process outlined in the Staff Report—at least insofar as it relates to the Commission's broadcast ownership rules—falls far short of satisfying the FCC's duty to allow a reasonable opportunity for public comment.[12] Allowing interested parties only three weeks to file comments on the vast array of topics addressed in the Report and on the complex policy and factual considerations that may mandate changes in the FCC's rules, without the benefit of any staff analysis or explanation of the Commission's intentions, is patently inadequate. In short, the FCC's apparent plan to use its internal

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[10] *See* Staff Report at 6.

[11] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 110-11 (1996). Nor can the Commission's failure to complete the 1998 biennial review in a more timely manner be used as an excuse for avoiding the agency's statutory obligation to conduct a full and thorough review in 2000.

[12] A rulemaking proceeding, defined under the Administrative Procedure Act as any "agency process for formulating, amending, or repealing a rule" must include a "meaningful opportunity to comment." 5 U.S.C. § 551; *Asiana Airlines v. FAA*, 134 F.3d 393, 396 (D.C. Cir. 1998) (*citing Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). The Commission's biennial reevaluation of its ownership rules similarly should be informed by input from the public and affected industry participants.

Staff Report as a tool to short circuit the 2000 biennial review process is insufficient to meet the Congressional mandate under Section 202(h) of the 1996 Act to take a fresh and thorough look at its ownership restrictions on a biennial basis.

II. BECAUSE THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE DOES NOT SERVE THE PUBLIC INTEREST, IT SHOULD BE REPEALED AS PART OF THE FCC'S YEAR 2000 BIENNIAL REVIEW

As NAA has shown exhaustively in its previous submissions, the FCC's ban on newspaper/broadcast cross-ownership does not serve any demonstrable public interest objective. NAA has demonstrated that the Commission's continued discrimination against newspaper owners ignores competitive realities—especially in light of the agency's 1999 decision to relax virtually every remaining broadcast ownership restriction other than the newspaper/broadcast cross-ownership rule—and is inconsistent both with the 1996 Act and with the First Amendment. NAA has further shown that the FCC's misguided policy threatens the ability of newspapers to continue to compete effectively against other, more diversified information providers. NAA hereby incorporates by reference its Comments and its Emergency Petition for Relief filed in the 1998 biennial review proceeding[13] and, once again, submits that the FCC should promptly take the necessary steps to eliminate this last vestige of an otherwise abandoned regulatory regime.

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[13] Emergency Petition for Relief of NAA, MM Docket Nos. 98-35, 96-197 (filed Aug. 23, 1999) ("Emergency Petition"); Comments of NAA, MM Docket No. 98-35 (filed July 21, 1998) ("NAA Comments"); Reply Comments of NAA, MM Docket No. 98-35 (filed Aug. 21, 1998). *See also* NAA Petition for Rulemaking in the Matter of Amendment of Section 73.3555 of the Commission's Rules to Eliminate Restrictions on Newspaper/Broadcast Station Cross-Ownership (filed April 28, 1997).

As NAA explained in its Emergency Petition,[14] the FCC's decision in its *1999 Television Ownership Order* to relax both the television "duopoly" and the "one-to-a-market" rules effectively eliminated any principled basis for continuing to maintain an absolute ban on newspaper/broadcast cross-ownership.[15] The Commission's decision to relax these anachronistic restrictions rested largely on its recognition that "there has been an increase in the number and types of media outlets available to local communities" and that "the benefits of joint ownership in certain instances outweigh the cost to diversity from permitting such combinations," at least "[i]n markets with many separate licensees and a variety of other media outlets."[16]

As NAA repeatedly has shown, precisely the same considerations fully justify elimination of the outdated newspaper/broadcast ban. Moreover, the Commission's own observations suggest that newspaper/broadcast cross-ownership implicates the agency's oft-cited diversity concerns to a *lesser* degree than common ownership of two television stations in the same market. In its decision to relax the duopoly and one-to-a-market rules, the FCC noted that "broadcast television, more so than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans."[17] Thus, the FCC viewed television

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[14] Emergency Petition at 11-14.

[15] *Review of the Commission's Regulations Governing Television Broadcasting, Report and Order*, 14 FCC Rcd 12903 (1999) ("*1999 Television Ownership Order*").

[16] *1999 Television Ownership Order*, 14 FCC Rcd at 12922; *see also id.* at 12930.

[17] *Id.* at 12934.

stations—and not daily newspapers—as the dominant voices insofar as the Commission's objectives are concerned.

Moreover, the FCC recognized that newspapers and broadcast stations are participants in the same marketplace.[18] In this regulatory environment, where common ownership of two TV stations and as many as six radio stations is permissible, it is patently arbitrary and discriminatory to continue to prohibit newspaper publishers from acquiring interests in even a single co-located television or radio station.

The Commission refused to consider NAA's Emergency Petition in its 1998 biennial review report and, instead, stated that it would be made part of the record in the next (2000) biennial review proceeding.[19] It is clear from the Staff Report, however, that no effort has yet been made to address the issues raised by the NAA in that filing, or more generally to consider the obvious relevance of the Commission's August 1999 decision substantially relaxing the television duopoly and one-to-a-market rules to the newspaper/broadcast cross-ownership restriction, the origins of which can be traced to the same one-outlet-per-customer regulatory approach that has now been abandoned for local television and radio station ownership. NAA submits that, far from justifying maintenance of the status quo in this second biennial proceeding, the FCC's prior

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[18] *See 1999 Television Ownership Order*, 14 FCC Rcd at 12953 (stating that the FCC had determined to include daily newspapers and cable systems in its voice count for the revised one-to-a-market rule "because we believe that such media are an important source of news and information on issues of local concerns and compete with radio and television, at least to some extent, as advertising outlets").

[19] *1998 Biennial Review Report*, at n. 203; Staff Report at 40, n. 134.

deregulatory actions provide a compelling rationale for ending the discriminatory treatment accorded daily newspaper publishers under the FCC's rules.

In addition to its own findings and actions in the *1999 Television Ownership Order*, moreover, the Commission has been presented with an abundance of evidence demonstrating that the ban on newspaper/broadcast cross-ownership does not serve the public interest. NAA and other parties have provided extensive and detailed evidentiary submissions establishing that:

- The marketplace for news, information, and entertainment is vastly more diverse and competitive than in 1975, eliminating any legitimate concerns with respect to programming or viewpoint diversity;[20]

- In this environment, no broadcast/newspaper combination is likely to have the potential to exercise market power;[21]

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[20] *See* Emergency Petition at 15; NAA Comments at 31-35; Assoc. of Local Television Stations ("ALTV") Comments, MM Docket No. 98-35, at 31-33 (filed July 21, 1998); Cox Broadcasting, Inc. and Media General, Inc. ("Cox/Media General") Comments, MM Docket No. 98-35, at 6-12 (filed July 21, 1998); Gannett Company, Inc. ("Gannett") Comments, MM Docket No. 98-35, at 12-16 (filed July 21, 1998); The Hearst Corporation ("Hearst") Comments, MM Docket No. 98-35, at 10-15 (filed July 21, 1998); Media Institute Comments, MM Docket No. 98-35, at 8, 14 (filed July 21, 1998); National Association of Broadcasters ("NAB") Comments, MM Docket No. 98-35, at 4, app. A (filed July 21, 1998); Tribune Company ("Tribune") Comments, MM Docket No. 98-35, at 22-51 (filed July 21, 1998). Moreover, the growth in the number and variety of sources of news, information, and entertainment has only accelerated in the time since these comments were filed. *See, e.g., Annual Assessment of the Status of Competition in the Markets for Delivery of Video Programming*, 15 FCC Rcd 978 (2000); *see also* Staff Report at 34-35.

[21] *See, e.g.*, Emergency Petition at 15; NAA Comments at 75-83, app. B; A. H. Belo Corporation ("Belo") Comments, MM Docket No. 98-35, at 29-32 (filed July 21, 1998); Gannett Comments at 7, 11-17, 24; Hearst Comments at 17-19; Media Institute Comments at 2-3.

- As the Commission has determined in numerous other proceedings, common ownership of media outlets fosters diversity in content and enhances programming in the public interest;[22]

- Commonly owned newspapers and broadcast stations typically maintain separate news and editorial staffs, enjoy operational independence, and compete vigorously with each other as well as with the extensive array of independently owned media outlets in the local marketplace;[23] and

- Co-owners tend to provide more and better local news and public affairs programming and often create "value added" services and new information products that would, in the absence of joint ownership, be too expensive to provide.[24]

In short, the Commission has before it an evidentiary record that is far more than sufficient to justify repeal of the newspaper/broadcast cross-ownership rules. Based on this evidence, NAA submits that the Commission is obligated under the 1996 Act, as well as basic principles of administrative and First Amendment law, to take the steps necessary to eliminate the anachronistic newspaper ban.

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[22] *See, e.g.*, Emergency Petition at 15; NAA Comments at 55-59; ALTV Comments at 34-36; The Chronicle Publishing Company ("Chronicle") Comments, MM Docket No. 98-35, at 13-25 (filed July 21, 1998); Cox/Media General Comments at 9-12; Gannett Comments at 27-28, app. B; Media Institute Comments at 5-6; NAB Comments at 8-11, app. B; Tribune Comments at 9-13.

[23] *See, e.g.*, Emergency Petition at 16; NAA Comments at 60-65; Belo Comments at 20-22; Chronicle Comments at 16-20; Gannett Comments at app. A; Lee Enterprises Comments at 4-5; NAB Comments at 8-11, app. B; Tribune Comments at 28-51.

[24] *See, e.g.*, Emergency Petition at 16; NAA Comments at 60-65; Belo Comments at 15-20; Chronicle Comments at 16-25, Exh. B; Gannett Comments at 27-32; Hearst Comments at 15-16, 19-22; Media Institute Comments at 15; Tribune Comments at 59-72.

CONCLUSION

The FCC's reliance on its internal Staff Report as its primary tool in completing its pending biennial review proceeding—without providing any current analysis of the newspaper ban or other broadcast ownership restrictions, nor any meaningful opportunity for public comment—could not possibly satisfy the Commission's obligation under Section 202(h) to thoroughly review its ownership regulations every two years. In addition, as was the case in the 1998 proceeding, the record already before the agency provides ample evidence that the newspaper/broadcast cross-ownership restriction does not serve any demonstrable public interest objective. Accordingly, consistent with its statutory mandate, the FCC must move beyond the Staff's abbreviated and incomplete analysis and promptly begin the process of repealing this outdated and unnecessary cross-ownership ban.

Respectfully submitted,

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